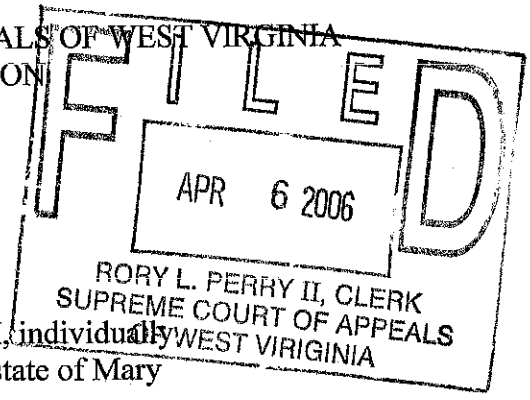
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
AT CHARLESTON



No. 052406

MARK MIKESINOVICH, individually
and as Executor of the Estate of Mary
Mikesinovich,

Appellant
and Plaintiff Below,

v.

REYNOLDS MEMORIAL HOSPITAL,

Appellee
and Defendant Below

APPELLANT'S REPLY BRIEF

JAMES G. BORDAS III #8518
GEOFFREY C. BROWN #9045
JAMES B. STONEKING #3627
BORDAS & BORDAS, PLLC
1358 National Road
Wheeling, WV 26003
(304) 242-8410
Counsel for the Appellant

BORDAS & BORDAS, PLLC
ATTORNEYS AT LAW
1358 NATIONAL ROAD
WHEELING, WEST VIRGINIA 26003
(304) 242-8410

OHIO OFFICE
246 W. MAIN STREET
ST. CLAIRSVILLE, OHIO 43950
(740) 695-8141

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BORDAS & BORDAS, PLLC
ATTORNEYS AT LAW
1358 NATIONAL ROAD
WHEELING, WEST VIRGINIA 26003
(304) 242-8410

OHIO OFFICE
246 W. MAIN STREET
ST. CLAIRSVILLE, OHIO 43950
(740) 695-8141

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BORDAS & BORDAS, PLLC
ATTORNEYS AT LAW
1358 NATIONAL ROAD
WHEELING, WEST VIRGINIA 26003
(304) 242-8410

OHIO OFFICE
246 W. MAIN STREET
ST. CLAIRSVILLE, OHIO 43950
(740) 695-8141

Introduction:

As Reynolds has now confirmed in its brief to this Court, several facts about this four day trial were simply not in dispute. It was undisputed that on January 24, 2001, Mary Mikesinovich fell to the floor at Reynolds Memorial Hospital, Inc. ("Reynolds") breaking her hip. It was undisputed that at the time of her fall, Mrs. Mikesinovich was under the direct control of Elizabeth Tagg, a nurse employed by Reynolds. It was undisputed that Mrs. Mikesinovich was 86 years old, just coming off of the effects of surgical anesthesia, and had just required the assistance of two nurses to make it to and from the bathroom. It was undisputed that Reynolds' own policies and procedures for such a transfer directed Nurse Tagg as follows: "Holding [the] patient firmly around the waist, assist [her] to [a] standing position." According to the policy, Nurse Tagg was to then "[h]ave [the] patient put [her] arm around [the nurse's] waist and support [the patient] firmly across the shoulders while walking." See Plaintiff's Exhibit No. 21 (Reynolds' Policies and Procedures for Lifting and Moving Patients) at page 3.

There was also no dispute at trial that Nurse Tagg modified that procedure on account of her short stature. As Reynolds points out in its brief before this Court, at trial, Nurse Tagg "explained, in detail, how she would hold a patient around the waist during a walking maneuver. She testified that she **would need** to grasp [the patient] around the waist because of her height differential and that in doing so, she was 'trying to make the patient safe.'" *Brief of Appellee* at 37 (emphasis supplied).

Critically, there was also no dispute at trial that Nurse Tagg failed to follow Reynolds' policies and procedures. There was also no dispute that Nurse Tagg ***failed to follow her own unauthorized modification of that procedure.*** Nurse Tagg did not "support

BORDAS & BORDAS, PLLC
ATTORNEYS AT LAW
1358 NATIONAL ROAD
WHEELING, WEST VIRGINIA 26003
(304) 242-8410

OHIO OFFICE
246 W. MAIN STREET
ST. CLAIRSVILLE, OHIO 43950
(740) 695-8141

[Mrs. Mikesinovich] firmly across the shoulders while walking" as required by her hospital's own policies and procedures. She also did not "grasp [Mrs. Mikesinovich] around the waist" as she "would need" to do according to her modification of that procedure. Instead, and in violation of the standard of care, she merely held Mrs. Mikesinovich by the arm during this transfer. *See, e.g., Trial Tr.* at 645-47, 668-69. As a result of her carelessness, Nurse Tagg lost control of Mrs. Mikesinovich, dropped her to the ground, and caused Mary's broken hip.

Despite the undisputed facts of this case, the jury deliberated for just forty-three minutes before returning a verdict for Reynolds. Unfortunately for Mr. Mikesinovich, his evidence was simply overwhelmed by the composition of this jury. Following *voir dire* the first day of trial, Mr. Mikesinovich was forced to use his two preemptory strikes on a jury that consisted of the following individuals: (1) a woman personally devastated by the perceived loss of her personal physician to malpractice litigation; (2) a man who said that his own life experiences would probably prevent him from awarding certain types of damages despite the trial court's instructions; (3) a former employee of the defendant who was concerned about contributing to the rising cost of health care through a malpractice verdict; (4) the spouse of a 23 year veteran of Reynolds' nursing staff; and (5) a woman who had been upset and angry at plaintiff's counsel for suing her daughter.

Reynolds' brief does nothing to dispute these core facts. Mr. Mikesinovich respectfully asks this Court to reverse the trial court and grant him a new trial.

I. The "Invited Error" Doctrine Is Inapplicable Because Mr. Mikesinovich Simply Discovered The Preexisting Biases Of The Prospective Jurors:

The thrust of this appeal is that the trial court erred in refusing to strike five jurors, for cause, who demonstrated bias in their *voir dire* responses. Before addressing the merits of this assigned error, Reynolds makes a curious argument, *i.e.*, that any error was somehow

BORDAS & BORDAS, PLLC
ATTORNEYS AT LAW
1358 NATIONAL ROAD
WHEELING, WEST VIRGINIA 26003
(304) 242-8410

OHIO OFFICE
246 W. MAIN STREET
ST. CLAIRSVILLE, OHIO 43950
(740) 695-8141

"invited" by the jury questionnaire. This is a curious argument because it essentially asks this Court to believe that these prospective jurors had somehow missed hearing about the medical liability crisis in this state until they read about it in the jury questionnaire. Regardless of the merits of the competing sides to the debate surrounding the medical liability crisis nationally and in West Virginia, there can be no doubt, as Judge Karl recognized on the record, that many if not all of these prospective jurors had been exposed to the "good PR work" done by the proponents of medical liability tort reform before they ever received the jury questionnaire. *See Trial Tr.* at 170-72. Far from inducing bias, the jury questionnaire was a useful and necessary mechanism for discovering how successful that "good PR work" had been on these jurors.

The reality is that Reynolds' "invited error" argument is nothing more than misdirection. Reynolds dedicates nearly ten pages of its brief to the questionnaire completed by prospective jurors prior to *voir dire*. According to Reynolds, Judge Karl, at Mr. Mikesinovich's urging, managed to "create a hypersensitive environment, through use of this questionnaire." *Brief of Appellee* at 15.

Obviously, the focus in cases involving juror qualifications is, and always has been, the jurors themselves: Did the jurors, through their *voir dire* responses, reveal any disqualifying bias or prejudice? See, e.g., West Virginia Human Rights Comm'n v. Tenpin Lounge, Inc., 158 W.Va. 349, 356, 211 S.E.2d 349 (1975) (noting that it is through *voir dire* that the parties "are informed of all relevant and material matters that might bear on possible disqualification of a juror"). Reynolds seeks to shift the focus away from Jurors Tuskey, Ullom, Anderson, West and McDiffitt and the answers they gave to questions posed during *voir dire*. Essentially, Reynolds is attempting to launch an improper collateral attack on the

BORDAS & BORDAS, PLLC
ATTORNEYS AT LAW
1358 NATIONAL ROAD
WHEELING, WEST VIRGINIA 26003
(304) 242-8410

OHIO OFFICE
246 W. MAIN STREET
ST. CLAIRSVILLE, OHIO 43950
(740) 695-8141

juror questionnaire when the real issue is whether the biases expressed by these particular jurors, in open court, warranted their being stricken for cause.[1]

Furthermore, and more fundamentally, Reynolds' argument is simply a misapplication of the "invited error" doctrine. The premise upon which Reynolds' argument rests is that Mr. Mikesinovich, in effect, induced the very bias that he now complains of. Nothing could be further from the truth.

The questionnaire was not written in a way to induce bias. Certainly, the questions proposed by Mr. Mikesinovich were not intended to create an anti-victim bias, or to cast victims in a poor light, or to otherwise promote the tort reform agenda. The suggestion that Mr. Mikesinovich is responsible for creating an environment hostile to victims of malpractice borders on the absurd. Was it Mr. Mikesinovich who induced Juror Tuskey's "devastation" over the fact that her personal physician was "driven . . . out of practice" by medical malpractice cases? Was Mr. Mikesinovich also responsible for the truck accident that led to Juror Ullom's reluctance to award damages for loss of enjoyment of life? Did Mr. Mikesinovich induce Juror McDiffitt's anger over the fact that her daughter was sued by the plaintiff's attorney? Obviously, these were not biases created by the plaintiff's questioning. Rather, they were previously existing biases brought to light by that questioning--which, after all, is the purpose *voir dire* is meant to serve.

Judge Karl was quick to recognize the reason behind the many negative responses to the jury questionnaire and follow up questioning. In his words, healthcare providers engaged in "good PR work" that saturated the media with stories concerning their lobbying efforts at

BORDAS & BORDAS, PLLC
ATTORNEYS AT LAW
1358 NATIONAL ROAD
WHEELING, WEST VIRGINIA 26003
(304) 242-8410

OHIO OFFICE
246 W. MAIN STREET
ST. CLAIRSVILLE, OHIO 43950
(740) 695-8141

[1] Reynolds is using its invited error argument as an open door to illegitimately reargue its writ of prohibition. Reynolds applied for a writ in May, 2003, challenging the jury questionnaire used by Judge Karl. Its writ was refused. If Reynolds genuinely believed that the jury questionnaire was erroneous, then its proper course was to file a cross-assignment of error in its response brief. App. R. 10(f). It did not. Instead, it attempts to repackage its earlier arguments, this time alleging that using the questionnaire amounted to "invited error."

the legislature, the "strike" in which local physicians participated, etc. Tort reform continues to be a hot topic dominating local headlines.

The purpose of *voir dire* is to gauge bias and prejudice, including fixed opinions held by jurors that would render them ineligible to serve. The case law has always encouraged the trial court and parties to engage in a thorough, robust *voir dire* to ferret out bias that would otherwise remain hidden. Tenpin Lounge, id., at 355 ("a fair trial requires a meaningful and effective voir dire"); Proudfoot v. Dan's Marine Service, Inc., 210 W.Va. 498, 505, 558 S.E.2d 298 (2002) (noting that the responsibility lies with the parties to conduct "a full and complete voir dire"); Pleasants v. Alliance Corp., 209 W.Va. 39, 46, 543 S.E.2d 320 (2001) (counsel must "ascertain the possibility of bias through probing questions on voir dire"); West Virginia Dep't of Highways v. Fisher, 170 W.Va. 7, 11, 289 S.E.2d 213 (1982) (a probing voir dire is necessary because a potential juror may have a disqualifying bias "even without his knowledge"). Reynolds urges the opposite view, effectively penalizing a party for conducting a thorough *voir dire*. As far as Reynolds is concerned, if a party dares to ask a question concerning tort reform he has tainted the entire jury panel. Accordingly, any bias elicited through his questioning is of his own making. It is hard to imagine a rule that would have a greater chilling effect on *voir dire*. Not surprisingly, Reynolds cites no cases to support this extraordinary legal proposition.

BORDAS & BORDAS, PLLC
ATTORNEYS AT LAW
1358 NATIONAL ROAD
WHEELING, WEST VIRGINIA 26003
(304) 242-8410

OHIO OFFICE
246 W. MAIN STREET
ST. CLAIRSVILLE, OHIO 43950
(740) 695-8141

The only case cited by Reynolds in the text of its brief[2] is State v. Ahmed, No. 84220 (Cuyahoga Cty. 6/16/05), an unpublished opinion from Ohio. Ahmed bears little, if any, resemblance to the present case. The defendant in Ahmed injected into the *voir dire* process a potentially prejudicial fact that was not previously known. Specifically, the defendant disclosed to the jury the fact that he was a Middle Easterner and a Muslim by faith. The state then asked *voir dire* questions of its own touching on these same topics. The defendant objected and assigned this as error. The court properly invoked the doctrine of "invited error," concluding that "Ahmed has waived any argument pertaining to this issue because defense counsel initiated and pursued this line of questioning during *voir dire*."

This is obviously a far cry from the present set of facts. The *voir dire* questioning here related to tort reform issues that were pervasive in the community. Tort reform was front and center in the media and played a significant role in the legislative session that concluded only months before this trial. Clearly, Mr. Mikesinovich was entitled to question jurors to see if they were influenced by the media coverage and, specifically, by the "PR" efforts undertaken by area physicians.

In summary, this is not a case involving "invited error." Mr. Mikesinovich engaged in proper *voir dire* questioning which revealed bias or prejudice on the part of five jurors. The question for appeal purposes is simply this: Did the trial court err in refusing to strike these

[2] Reynolds cites a handful of additional cases in a footnote. These cases are easily distinguishable. The defendant in Powell v. Commonwealth, 267 Va. 107, 590 S.E.2d 537 (2004), informed the jury panel of a prior conviction for capital murder. Likewise, the defendant in State v. Deiterman, 271 Kan. 975, 29 P.3d 411 (2001), questioned a juror concerning the contents of a prejudicial article in the presence of the remaining jurors. Obviously, in both cases, the defendant improperly exposed jurors to prejudicial facts that were previously unknown. The defendant also cites State v. Elmore, 985 P.2d 289 (Wash. 1999). The issue in Elmore did not arise out of *voir dire* but, instead, arose out of a statement of facts read to the jury which was prepared, in part, by the defendant. The "invited error" doctrine was applied because the defendant participated in drafting of the statement.

BORDAS & BORDAS, PLLC
ATTORNEYS AT LAW
1358 NATIONAL ROAD
WHEELING, WEST VIRGINIA 26003
(304) 242-8410

OHIO OFFICE
246 W. MAIN STREET
ST. CLAIRSVILLE, OHIO 43950
(740) 695-8141

jurors for cause? For the reasons set forth hereafter, the trial court did err and Mr. Mikesinovich is entitled to a new trial.

II. The Trial Court Erred By Refusing to Strike for Cause Five Jurors With Clear, Disqualifying Biases:

Reynolds' argument concerning Judge Karl's refusal to strike Jurors Tuskey, Ullom, Anderson, West, and McDiffitt is largely of the straw man type. Indeed, the introductory sentence of its argument on this point reads, "The Appellant complains about the denial of his motions during *voir dire* to strike for cause five prospective jurors, but such complaint is based ***solely*** upon certain vague and ambiguous answers by these prospective jurors to questions on the juror questionnaire." *Brief of Appellee* at 17 (emphasis added). Reynolds' argument is incorrect. While these jurors' responses to the questionnaire are telling, Mr. Mikesinovich is primarily concerned with the statements made by the jurors on the first day of trial and the timing and methodology employed by Judge Karl in refusing to strike those jurors for cause. For example:

- It was during *voir dire* the first day of trial, not on her jury questionnaire, that Shelly Tuskey said that it was her belief that medical negligence cases "***actually [have] changed our health care system. . . . Right now, it's actually gotten worse, I think as far as our health care. And it [malpractice litigation] has driven a lot of doctors out of practice and [into] retirement.***" *Trial Tr.* at 49.
- It was during *voir dire* on the first day of trial that Ms. Tuskey said that among the "lot" of doctors she believed to have been driven out of practice was her personal doctor of over 30 years. Ms. Tuskey admitted that she was "devastated" by the loss of her private physician

BORDAS & BORDAS, PLLC
ATTORNEYS AT LAW
1358 NATIONAL ROAD
WHEELING, WEST VIRGINIA 26003
(304) 242-8410

OHIO OFFICE
246 W. MAIN STREET
ST. CLAIRSVILLE, OHIO 43950
(740) 695-8141

to this lawsuit and agreed that she was surprised by the allegations against him "[b]ecause of the character of him as a doctor." *Trial Tr.* at 49-50.

- It was during *voir dire* on the first day of trial that Dana Ullom stated that his life-experiences "would probably prevent" him from returning a verdict on certain elements of damage. *See Trial Tr.* at 148.
- It was during *voir dire* on the first day of trial that Mr. Ullom said that he believed that health care providers were being treated unfairly by the civil justice system because "[t]hey spend their time, it's like anything, like the sheriff's department, fire department, anything where someone is trying to better themselves, it takes their time and their money to do this, and then like I say, the rates just keep going up. Your insurance just goes up." *Trial Tr.* at 150-51.
- It was during *voir dire* the first day of trial that Carl Anderson discussed the fact that he was a former employee of Reynolds Memorial Hospital, whose father was a physician who had been sued for medical malpractice, whose close friends were physicians who had discussed with him the increasing cost of their medical malpractice insurance premiums. Mr. Anderson further stated that he believed that this case when "combined with hundreds of others or thousands" could play a part in rising health care costs and that it was possible that his concerns about these rising costs would be on his mind during deliberations. *Trial Tr.* at 155-65.

BORDAS & BORDAS, PLLC
ATTORNEYS AT LAW
1358 NATIONAL ROAD
WHEELING, WEST VIRGINIA 26003
(304) 242-8410

OHIO OFFICE
246 W. MAIN STREET
ST. CLAIRSVILLE, OHIO 43950
(740) 695-8141

- It was during *voir dire* the first day of trial that David West discussed the fact that his ***wife had worked as a nurse for the defendant for the last 23 years*** and that the very first thing Mr. West did upon receiving his jury questionnaire was show it to his wife to see if she knew any of the nurses whose conduct was at issue in the litigation. *See Trial Tr.* at 173-78.
- It was during *voir dire* on the first day of trial that Karen McDiffitt told the court and the parties that her daughter had previously been sued by plaintiff's counsel and that she had been "angry" and "upset" about that because she thought the undersigned firm was representing a client falsely claiming to be hurt. *See Trial Tr.* at 248-50.

Far from being "based ***solely*** upon certain vague and ambiguous answers . . . to questions on the juror questionnaire," these jurors should have been stricken based on the absolutely clear expressions of bias during *voir dire* the day of trial. More to the point, it was improper for Judge Karl to take Mr. Mikesinovich's motions for cause under advisement with respect to Jurors Tuskey, Ullom and Anderson and then deny those motions after evaluating their bias in relation to the remaining members of the panel. *See Trial Tr.* at 56 (Ms. Tuskey taken under advisement), 155 (Mr. Ullom taken under advisement), 170-72 (Mr. Anderson taken under advisement after discussion regarding "good PR work" by physicians), 185 (Mr. West taken under advisement), 204-05 (motions regarding Tuskey, Ullom, Anderson, and West denied). The test for qualifying as a juror in West Virginia is an objective bright-line test, not a sliding scale that permits unqualified jurors to sit simply because the jury pool is badly tainted.

BORDAS & BORDAS, PLLC
ATTORNEYS AT LAW
1358 NATIONAL ROAD
WHEELING, WEST VIRGINIA 26003
(304) 242-8410

OHIO OFFICE
246 W. MAIN STREET
ST. CLAIRSVILLE, OHIO 43950
(740) 695-8141

Although Reynolds cites extensively from lower court opinions from other jurisdictions, Mr. Mikesinovich respectfully submits that the issue before this Honorable Court is whether the five jurors at issue here were free from bias or prejudice according to the well-developed principles articulated in Syl. Pts. 3, 4 & 5, O'Dell v. Miller, 211 W. Va. 285, 565 S.E.2d 407 (2002); Rine v. Irisari, 187 W. Va. 550, 555-56, 420 S.E.2d 541, 546-47 (1992); and Syl. Pts. 1 & 2, Davis v. Wang, 184 W. Va. 222, 400 S.E.2d 230 (1990), *overruled on other grounds*, Pleasants v. Alliance Corp., 209 W. Va. 39, 543 S.E.2d 320 (2001). Mr. Mikesinovich respectfully argues that based on the law of West Virginia as articulated by this Court, these five jurors should have been stricken for cause.

Reynolds argues that "none of the challenged prospective jurors in this case are alleged to have any party bias." *Brief of Appellee* at 19. Again, this is simply incorrect. For example, in this case involving nursing negligence at Reynolds Memorial Hospital, it was clearly a matter of party bias that Juror West's wife had been a nurse employed by Reynolds for the last 23 years. This is a much stronger indication of "party bias" than existed in Rine where this Court held that a juror should have been excused because he operated a grocery store across the street from the defendant's office and might find it difficult to return a verdict knowing he would likely meet the defendant's wife again. *See* Rine, 187 W. Va. at 552-55.

Without citing to any of Mr. Mikesinovich's pleadings, Reynolds represents that "the Appellant contends that any prospective juror with opinions about the state of our tort system or medical malpractice issues must be stricken automatically from serving as a potential juror." *Brief of Appellee* at 23. Once again, this is nothing more than a straw man. Mr. Mikesinovich has never once argued or suggested that any individual with an opinion about our tort system is automatically disqualified. Mr. Mikesinovich simply argues that ***he should***

BORDAS & BORDAS, PLLC
ATTORNEYS AT LAW
1358 NATIONAL ROAD
WHEELING, WEST VIRGINIA 26003
(304) 242-8410

OHIO OFFICE
246 W. MAIN STREET
ST. CLAIRSVILLE, OHIO 43950
(740) 695-8141

not have been forced to use his two peremptory strikes on a jury that consisted of a woman personally devastated by the perceived loss of her personal physician to litigation, a man who said that his own life experiences would probably prevent him from awarding certain types of damages, a former employee of the defendant who was concerned about contributing to the rising cost of health care, the spouse of a 23 year veteran of the defendant's nursing staff, and a woman who had been upset and angry at plaintiff's counsel for suing her daughter. These were not biases "created" by the jury questionnaire. These were the biases the potential jurors brought with them that day and counsel would not have been doing their job by sticking their heads in the sand and not discovering these issues.

Because Reynolds quotes from Davis, it is worth considering again the Court's holdings in that case:

> 1. "When individual voir dire reveals that a prospective juror feels prejudice against the defendant which the juror admits would make it difficult for him to be fair, and when the juror also expresses reluctance to serve on the jury, the defendant's motion to strike the juror from the panel for cause should ordinarily be granted." Syllabus point 1, *State v. Bennett*, 181 W.Va. 269, 382 S.E.2d 322 (1989).
>
> 2. A prospective juror who admits a prejudice to an issue central to the outcome of the case cannot negate the prejudice merely by stating they would follow the law as instructed by the court. A jury comprised of members who do not believe in a certain type of damages, yet reluctantly agree that they will follow law to the contrary, does not constitute an impartial jury as envisioned by this Court in *State v. Matney*, 176 W.Va. 667, 346 S.E.2d 818, 822 (1986).

Syl. Pts. 1 & 2, Davis. Applied to the case before it, Davis reversed the trial court and granted a new trial where that trial court should have stricken for cause one juror who stated that "she did not believe in damages for mental anguish, yet reluctantly stated that she would follow the law if so instructed." Davis, 184 W. Va. at 225. Similarly, here, Mr. Ullom stated that his

BORDAS & BORDAS, PLLC
ATTORNEYS AT LAW
1358 NATIONAL ROAD
WHEELING, WEST VIRGINIA 26003
(304) 242-8410

OHIO OFFICE
246 W. MAIN STREET
ST. CLAIRSVILLE, OHIO 43950
(740) 695-8141

own life experiences "would probably prevent" him from returning an award for Mrs. Mikesinovich's loss of enjoyment of life. *Trial Tr. at 148.* Even on further questioning *by the trial judge*, Mr. Ullom first stated that stated that he "would probably have to" follow the judge's instructions, but even then, Mr. Ullom was simply unable to say that he could be a fair juror. *See Trial Tr.* at 152-53.

In Davis, this Court held that another juror should have been stricken where "Steptoe and Johnson, the law firm which represented the defendants, had in the past done some work for his corporation, that his son-in-law was a doctor, and that his daughter and wife were nurses. He also testified that he had reservations about returning a damage award for pain and suffering." Davis, 184 W. Va. at 225. Similarly here, Mr. Anderson was a former employee of the defendant with serious personal and professional reservations about malpractice suits. Mr. West's wife was a 23 year veteran of the defendant's nursing staff and virtually his entire family worked in the health care industry.

As Davis recognized, "Any doubt the court might have regarding the impartiality of a juror must be resolved in favor of the party seeking to strike the potential juror." Davis, 184 W. Va. at 226, *citing* State v. West, 157 W. Va. 209, 200 S.E.2d 859, 866 (1973). As the transcript indicates, Judge Karl did have doubts about these potential jurors, but he did not resolve those doubts in favor of Mr. Mikesinovich. Rather, he took Mr. Mikesinovich's motions to strike under advisement and eventually denied them after having had an opportunity to compare the jurors at issue with the remaining members of the panel. *See Trial Tr. at* 56, 155, 170-72, 185, 204-05. Jurors Tuskey, Ullom, Anderson, West and McDiffitt should not have been qualified as jurors in this case. After peremptory strikes, a full one-half of this jury consisted of jurors with clear, expressed and disqualifying biases. It was perhaps

BORDAS & BORDAS, PLLC
ATTORNEYS AT LAW
1358 NATIONAL ROAD
WHEELING, WEST VIRGINIA 26003
(304) 242-8410

OHIO OFFICE
246 W. MAIN STREET
ST. CLAIRSVILLE, OHIO 43950
(740) 695-8141

of little wonder that the jury returned a verdict in Reynolds' favor despite overwhelming evidence to the contrary.

III. As Demonstrated By Reynolds' Brief, The Evidence Concerning Nurse Tagg's Negligence Was Overwhelming:

This case arose out of the fact that Nurse Elizabeth Tagg dropped Mrs. Mikesinovich while attempting to transfer her from a chair into a wheelchair. Nurse Tagg was Reynolds' corporate representative at trial and Reynolds had her recognized as an expert "in the areas of nursing care, specifically as it relates to assessment and transfer of patients." *See Trial Tr.* at 619, 623. Specifically, Reynolds elicited testimony from Nurse Tagg regarding whether or not she believed her care and treatment of Mary Mikesinovich met the "standard of care in all respects." *See Trial Tr.* at 624.

Mr. Mikesinovich argues that even giving Reynolds the benefit of the doubt, Nurse Tagg was obligated to do one of two things in walking Mrs. Mikesinovich from her chair into the wheelchair. First, she could have followed her own hospital's policies and procedures for such a transfer. Again, Reynolds' policies and procedures for "Assisting Patient[s] to Walk" states: "Holding [the] patient firmly around the waist, assist [her] to [a] standing position." According to the policy, Nurse Tagg was to then "[h]ave [the] patient put [her] arm around [the nurse's] waist and support [her] firmly across the shoulders while walking." See Plaintiff's Exhibit No. 21 (Reynolds' Policies and Procedures for Lifting and Moving Patients) at page 3.

Mr. Mikesinovich agrees with Reynolds that at trial, Nurse Tagg testified that she modified Reynolds' procedure on account of her short stature and that "[s]he explained, in detail, how she would hold a patient around the waist during a walking maneuver. She

BORDAS & BORDAS, PLLC
ATTORNEYS AT LAW
1358 NATIONAL ROAD
WHEELING, WEST VIRGINIA 26003
(304) 242-8410

OHIO OFFICE
246 W. MAIN STREET
ST. CLAIRSVILLE, OHIO 43950
(740) 695-8141

testified that she **would need** to grasp [the patient] around the waist because of her height differential and that in doing so, she was 'trying to make the patient safe.'" *Brief of Appellee at 37* (emphasis supplied).

As such, Nurse Tagg had two choices if she was going to attempt this transfer by herself. Nurse Tagg could have supported Mrs. Mikesinovich firmly across the shoulders as required by hospital policy, or she could have held Mrs. Mikesinovich around the waist as "she would need to" according to her own modification of that policy. However, the evidence at trial was undisputed. Nurse Tagg did neither of these things. Instead, she simply held Mrs. Mikesinovich's arm or coat sleeve and allowed her to fall to the ground breaking her hip. *See, e.g., Trial Tr.* at 645-47, 668-69.

Mr. Mikesinovich was not asking Nurse Tagg to "check[] her education, training, and experience at the door" as suggested by Reynolds. *Brief of Appellee* at 37-38. Quite to the contrary, Mr. Mikesinovich was simply asking Nurse Tagg to either follow her hospital's own policies or at the very least her own modification of that procedure. She did neither and Mrs. Mikesinovich fell as a result.

IV. There Was No Legitimate Purpose In Allowing Reynolds To Cross-Examine Mr. Mikesinovich About The Fact That He Took A Copy Of His Mother's Nurse's Notes:

After Mrs. Mikesinovich fell at Reynolds on January 24, 2001, she was transferred to Wheeling Hospital for further treatment of her broken hip. The issue here is whether Reynolds should have been allowed to cross-examine Mr. Mikesinovich about the fact that he took a page of his mother's nurse's notes with him to Wheeling Hospital that day. Because this collateral fact had no bearing on any fact at issue in this case and because its injection

BORDAS & BORDAS, PLLC
ATTORNEYS AT LAW
1358 NATIONAL ROAD
WHEELING, WEST VIRGINIA 26003
(304) 242-8410

OHIO OFFICE
246 W. MAIN STREET
ST. CLAIRSVILLE, OHIO 43950
(740) 695-8141

into the jury's mind irrevocably prejudiced Mr. Mikesinovich, the trial court erred by allowing this line of questioning.

The first justification Reynolds cites for the admission of this collateral fact was that the "testimony was relevant to explain the reason for the existence of two nearly identical nurse's notes." *Brief of Appellee* at 40. Of course, this concern could have been entirely alleviated if the trial court and Reynolds would have taken advantage of Mr. Mikesinovich's offer to allow Reynolds to choose which of the two notes it wanted to send to the jury. Because the notes were, by Reynolds' own admission, "nearly identical," Reynolds would not have been forced to weigh the competing strengths and weaknesses of the two notes. It simply could have picked one of the notes. This would have completely addressed Reynolds' stated concern without the necessity of painting Mr. Mikesinovich as a thief. *See Trial Tr.* at 498-504.

The second justification cited by Reynolds for the admission of evidence concerning Mr. Mikesinovich's removal of his mother's nurse's note is the "issue of Nurse Tagg's memory and credibility since the two notes are nearly identical." *Brief of Appellee* at 40. As stated above, this was not a trial that revolved around Nurse Tagg's recollection and credibility. The material facts were not in dispute. There was no dispute that Reynolds' policies and procedures required Nurse Tagg to transfer Mrs. Mikesinovich from the chair to the wheelchair in a certain manner. There was no dispute that Nurse Tagg did not follow that procedure. There was no dispute that Mrs. Mikesinovich fell during that attempted transfer and there was no dispute that Mrs. Mikesinovich broke her hip as a result of that fall. The only question was whether Nurse Tagg's deviation from her own hospital's policies also constituted a deviation from the standard of care. Nurse Tagg's "recollection" has nothing to

BORDAS & BORDAS, PLLC
ATTORNEYS AT LAW
1358 NATIONAL ROAD
WHEELING, WEST VIRGINIA 26003
(304) 242-8410

OHIO OFFICE
246 W. MAIN STREET
ST. CLAIRSVILLE, OHIO 43950
(740) 695-8141

do with this. Indeed, the veracity of Nurse Tagg's recollection, *i.e.*, her recollection that all she did was hold onto Mrs. Mikesinovich's arm during the transfer, was central to Mr. Mikesinovich's case.

Regardless of the manner in which Reynolds was permitted to bring to the jury's attention the fact that Mr. Mikesinovich took a copy of his mother nurse's notes with him that day, the impression that he was not a concerned son, but rather a prospective litigant, was unmistakable. Perhaps with another jury, Mr. Mikesinovich would have been able to overcome this impression. However, given the prejudices of this jury, the fact that Mr. Mikesinovich took a copy of his mother's nurse's notes with him was fatal.

It is worth remembering that during *voir dire*, each of the five jurors at issue in this appeal demonstrated that they were predisposed to resolve issues like this against Mr. Mikesinovich. For example, one of the issues the jury had to deal with in this case was whether or not it could follow the law and award survivorship damages to Mr. Mikesinovich for his mother's suffering even though she had died before the trial. As Mr. West said, without hearing anything else about the case, he might have a hard time awarding such damages because "by what I read in there [the jury questionnaire], it's not her. She is dead already." *Trial Tr.* at 175. Mr. Ullom was concerned that even though health care providers were just trying to better themselves, their insurances rates "just keep going up" as a result of lawsuits. *Trial Tr.* at 150. Perhaps most importantly, Ms. McDiffitt believed that in the past Bordas & Bordas had represented someone falsely claiming to have been hurt. *See Trial Tr.* at 248-50.

Many of these jurors clearly went into this process asking themselves why they should award damages to Mr. Mikesinovich because his mother broke her hip. Any hope that Mr.

BORDAS & BORDAS, PLLC
ATTORNEYS AT LAW
1358 NATIONAL ROAD
WHEELING, WEST VIRGINIA 26003
(304) 242-8410

OHIO OFFICE
246 W. MAIN STREET
ST. CLAIRSVILLE, OHIO 43950
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Mikesinovich had of getting the jury to follow the law in this regard was lost when Reynolds was allowed to introduce evidence that he took a copy of his mother's nurse's notes with him that day. The admission of this collateral fact simply reinforced the biases already held by the jury. In their minds it just confirmed what they already thought, that Mr. Mikesinovich was just another litigation hungry plaintiff seeking to profit from his mother's misfortune while causing health care costs to go up for all of us. This inference was inescapable, prejudicial, and completely unnecessary.

V. Conclusion:

Despite undisputed evidence to the contrary, the jury returned a verdict for Reynolds Hospital in less than forty-five minutes. Even after preemptory strikes, a full one-half of this jury had previously expressed clear and unambiguous bias against Mr. Mikesinovich. The biases of these jurors were not created by the jury questionnaire. Due to their own life experiences or the "good PR work" of the tort reform lobby, those biases were already in the minds of the jurors when they showed up to court that morning. Plaintiff's counsel in this and other cases would be failing their duty to conduct proper *voir dire* if they hid from inquiring into those biases under the shadow of "invited error."

Having seated a jury clearly prejudiced against him, perhaps this trial was over for Mr. Mikesinovich before it began. Nonetheless, any hope that Mr. Mikesinovich had to overcome this jury's beliefs about him was lost when the trial court allowed the jury to hear that Mr. Mikesinovich took a page of his mother's nurse's notes that day. This entirely collateral fact simply reinforced in the minds of the jurors what they believed to be true about malpractice plaintiffs to begin with.

BORDAS & BORDAS, PLLC
ATTORNEYS AT LAW
1358 NATIONAL ROAD
WHEELING, WEST VIRGINIA 26003
(304) 242-8410

OHIO OFFICE
246 W. MAIN STREET
ST. CLAIRSVILLE, OHIO 43950
(740) 695-8141

The jury's underlying prejudice, confirmed at trial by Reynolds and the trial court, gave the jury all of the evidence it needed to disregard the overwhelming evidence of Reynolds' liability for what happened to Mrs. Mikesinovich. Mr. Mikesinovich respectfully asks this Court for a new trial.

MARK MIKESINOVICH, Individually, and as Executor of the Estate of Mary Mikesinovich, Plaintiff,

By:

JAMES G. BORDAS III #8518
GEOFFREY C. BROWN #9045
JAMES B. STONEKING #3627
BORDAS & BORDAS, PLLC
1358 National Road
Wheeling, WV 26003
(304) 242-8410
Counsel for the Plaintiff-Appellant

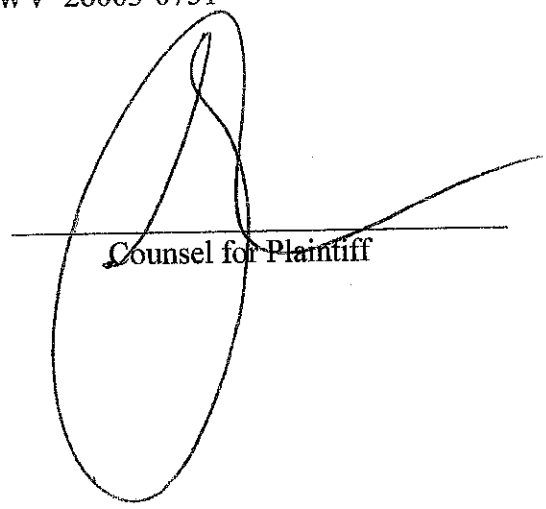
BORDAS & BORDAS, PLLC
ATTORNEYS AT LAW
1358 NATIONAL ROAD
WHEELING, WEST VIRGINIA 26003
(304) 242-8410

OHIO OFFICE
246 W. MAIN STREET
ST. CLAIRSVILLE, OHIO 43950
(740) 695-8141

CERTIFICATE OF SERVICE

Service of the foregoing PLAINTIFF'S REPLY BRIEF was had upon counsel of record herein by mailing a true copy thereof via the United States mail on this 5th day of April 2006, to:

James C. Wright, Esq.
STEPTOE & JOHNSON
1223 Main Street, Suite 3000
PO Box 751
Wheeling, WV 26003-0751



Counsel for Plaintiff

BORDAS & BORDAS, PLLC
ATTORNEYS AT LAW
1358 NATIONAL ROAD
WHEELING, WEST VIRGINIA 26003
(304) 242-8410

OHIO OFFICE
246 W. MAIN STREET
ST. CLAIRSVILLE, OHIO 43950
(740) 695-8141